88-33
No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

KIRBY D. BLEDSOE, JR., PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

LEO L. SERGI
Colonel, Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

FRANK J. SPINNER
Major, Office of The Judge Advocate General
United States Air Force

Counsel for Petitioner

July 1988

QUESTION PRESENTED

Did the United States Court of Military Appeals err by failing to apply *Estelle v. Smith,* 451 U.S. 454, in ruling that petitioner waived a prosecutor's surprise use, while cross-examining a defense witness, of privileged statements made by petitioner during a sanity evaluation?

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional Provision Involved	2
Manual for Courts-Martial Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	12
Appendix A	1a
Appendix B-1	15a
Appendix B-2	23a
Appendix B-3	25a

TABLE OF AUTHORITIES

Cases:

Chapman v. California, 386 U.S. 18 (1967)	11
Estelle v. Smith, 451 U.S. 454 (1981)	*passim*
Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979)	10
United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975)	9
United States v. Bledsoe, 19 M.J. 641 (A.F.C.M.R. 1984), *aff'd*, 26 M.J. 97 (C.M.A. 1988)	*passim*
United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983), *cert. denied*, 464 U.S. 934 (1983)	9

Constitution and Statutes:

U.S. Const. Amendment V	*passim*
10 U.S.C. § 867(h)(Supp III 1985)	1
28 U.S.C. § 1259(3)(Supp III 1985)	1
Uniform Code of Military Justice: Art. 31, 10 U.S.C. § 831 (1982)	3

Rules of Criminal Procedure:

Fed.R.Crim.P. 12.2(c)	3

Page

Rules of Evidence:

Mil.R.Evid. 103(a)(1) 2, 9, 10, 11

Mil.R.Evid. 302(a) ..... *passim*

Mil.R.Evid. 305 3

Regulations:

Manual for Courts-Martial, United States, 1969 (Rev.) paragraph 121 ..... 3, 4, 6, 10

Rule for Courts-Martial (R.C.M.) 706 2

Miscellaneous:

American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders (APA, Wash; D.C. 3d. ed. 1980) 5

In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

KIRBY D. BLEDSOE, JR., PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Kirby D. Bledsoe, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on May 9, 1988.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals was issued on May 9, 1988 (Appendix A). A decision of the United States Air Force Court of Military Review remanding the case was issued on September 30, 1983 (Appendix B-1). An order denying a petition for new trial was issued on June 24, 1984 (Appendix B-2). The Court of Review's final decision was issued on October 26, 1984 (Appendix B-3).

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h)(Supp III 1985) and 28 U.S.C. § 1259(3) (Supp III 1985). The judgment of the United States Court of Military Appeals was entered on May 9, 1988.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be. . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

MANUAL FOR COURTS-MARTIAL PROVISIONS INVOLVED

Rule 103 of the Military Rules of Evidence, *Manual for Courts-Martial, United States, 1984* ("M.C.M., 1984"), provides in pertinent part:

> (a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context;

Rule 302[1] of the Military Rules of Evidence, *Manual for Courts-Martial, United States, 1969 (Revised edition)* ("M.C.M. 1969 (Rev.)"), as originally promulgated, provided in pertinent part:

> (a) *General rule.* The accused has a privilege to prevent any statement made by the accused at a mental

---

[1] The current version of Mil.R.Evid. 302(a), as promulgated by *Manual for Courts-Martial, United States, 1984*, Exec. Order No. 12550, remains unchanged from the version relied upon by petitioner with the exception of reference to Rules for Courts-Martial (R.C.M.) 706 in place of reference to paragraph 121 (which is a similar provision to Rule 706).

examination ordered under paragraph 121 [2] of this Manual and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by rule 305 [3] at the examination. [4]

---

[2] Paragraph 121, M.C.M., 1969 (Rev.), provided for inquiry concerning the accused's sanity at either the time of the alleged offense or at the time of the inquiry. Prior to referral of charges, such an inquiry could be ordered by the convening authority. After charges are referred to trial, the inquiry could be ordered by the military judge.

[3] Mil.R.Evid. 305, M.C.M., 1969 (Rev.), provides that a person subject to the Uniform Code of Military Justice (U.C.M.J.) who is required to give warnings under Article 31, U.C.M.J., may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(1) informing the accused or suspect of the nature of the accusation;

(2) advising the accused or suspect that the accused or suspect has the right to remain silent;

(3) advising the accused or suspect that any statement may be used as evidence against the accused or suspect in a trial by courts-martial; and, when the interrogation is custodial,

(4) advising the accused or suspect that they are entitled to consult with counsel that shall be provided by the United States at no expense to the person, or the person may retain civilian counsel at no expense to the United States.

[4] Mil.R.Evid. 302(a) is directly analogous to Federal Rule of Criminal Procedure 12.2(c), which provides in pertinent part:

(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert

* * *

(c) *Release of evidence.* If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to paragraph 121 of this Manual. If the defense offers statements made by the accused at such examination the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

STATEMENT OF THE CASE

On February 22, 1983, the trial of the petitioner by general court-martial, with members, began at Lackland Air Force Base, Texas. Two days later, contrary to his pleas, he was found guilty of larceny and willfully damaging military property. The court sentenced him to a dishonorable discharge, confinement for thirty (30) months, forfeiture of $400.00 pay per month for thirty (30) months, and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged on May 2, 1983. On September 30, 1983, the United States Air Force Court of Military Review (Court of Review) set aside the convening authority's action and returned the case with instructions to conduct a further inquiry concerning the petitioner's sanity. On October 26, 1984, the Court of Review affirmed the findings of guilt

---

based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceedings except on an issue respecting mental condition on which the defendant has introduced testimony.

and modified the sentence to include a bad conduct discharge, confinement at hard labor for twenty (20) months, forfeiture of $397.00 pay per month for twenty (20) months, and reduction to the lowest enlisted grade.

During presentation of the defense's case, the defense called Dr. Thomas Martin, a member of petitioner's sanity board. Dr. Martin testified that he and the other two members of the sanity board had concurred in the diagnosis that petitioner had a conversion disorder [5] prior to the alleged larceny on July 14, 1982. (R. 209). Dr. Martin further testified he had reviewed petitioner's hospital records and family history, but he stated that he had received little information from Airman Bledsoe. (R. 210).

At the end of the direct examination of Dr. Martin, the prosecution requested permission to review the record of the sanity board, saying:

> [S]ince there has been sufficient opening of that door by the testimony of Doctor Martin as to the history of the accused, particularly the statements made by the accused in the evaluation process and the Government would request permission for access to whatever statements he might have made, so we can conduct an effective cross-examination of this witness. That is Rule 302.

(R. 218). The defense immediately objected and contended that Dr. Martin's testimony had not opened "any door for the Government to go behind and see what the sanity

---

[5] A conversion disorder is a loss of or alteration in physical functioning that suggests physical disorder but which instead is apparently an expression of a psychological conflict or need. This disturbance is not under voluntary control. *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders* 244 (APA, Washington, D.C., 3d ed. 1980).

board had to say whatsoever." (R. 219). Upon reviewing the sanity board documentation, the military judge overruled the defense objection. (R. 222).

After receiving the sanity board documentation, the prosecutor then remarked:

> During the course of my investigation, by talking to Doctor Martin and talking to Doctor Townsend-Parchman, there were certain statements made by the accused during the course of the evaluation underlying the sanity board. These statements were made to these doctors and they were made known to me. Being aware of the restrictions of paragraph 121 of the Manual, however, they were not mentioned before, and I have not used this information in any way up to this point. However, it is the Government's contention that the door has been opened by Defense by asking Doctor Martin about the background history related to him by the accused and this clearly would indicate verbal statements both by the accused and by the accused's wife during the course of the sanity proceedings and the Government at this time would like to make an offer of proof as to those statements.
>
> * * *
>
> The one statement that was given to Doctor Martin earlier in his evaluation dealt with financial problems that the accused and his wife were experiencing and, of course, the relevancy of this is the Government contends that financial problems underlies [sic] the larcenies. Secondly, the accused stated to Doctor Townsend-Parchman, in the presence of Doctor Martin, "You are not going to get me on this offense. I'm going to beat this rap." That goes to his entire motivation, and checking himself in a hospital in

> Houston, which supports the Government's theory of what we have here is an attempt to avoid prosecution.

(*Id.*). The defense objected that evidence of petitioner's statements would be prejudicial and lacking in probative value. (R. 223). The military judge overruled the objections. (*Id.*).

During cross-examination by the prosecutor, Dr. Martin testified that petitioner had been "having considerable financial difficulties and as he put it, he was receiving a lot of pressure from his wife to obtain funds." (R. 224). Dr. Martin also testified that around December 15, 1982, he walked by petitioner, who was talking to Dr. Townsend-Parchman in the hallway of a hospital ward. (*Id.*). He "heard Airman Bledsoe comment to Dr. Townsend-Parchman that, 'I am going to show you guys. I am going to beat this rap' ". (R. 225).

In affirming the decision of the Court of Review, the Court of Military Appeals stated that the prosecutor obtained knowledge of petitioner's statements by violating the doctors' obligations of confidentiality and failed "to provide 'timely notice' " to the defense that he knew about these statements. Furthermore, the court expressed that the prosecution's contention that defense counsel "had opened the door" through the use of derivative evidence was "weak" and that petitioner was "entitled to prevent use of the two statements in cross-examining Dr. Martin". *United States v. Bledsoe,* 26 M.J. 97, 103 (C.M.A. 1988). The court relied on waiver and a failure to show prejudice in ruling against the petitioner. *Id.*

REASONS FOR GRANTING THE WRIT

I

This case is worthy of review because it presents a clear constitutional error in conjunction with rules of evidence

and procedure common to military and civilian practice. Moreover, it raises the important issue of whether a constitutional error is waived by an accused's failure to "particularize" an objection where the prosecution "surprises" the defense with new evidence in the form of an accused's own statements.

Although this issue arises in a military context and the rules of evidence and procedure have experienced minor changes, the general nature of the problem regarding how to handle statements made by an accused during a sanity evaluation is not unique. As shown in Point II, petitioner's case is very similar to a case which was decided by the Court of Appeals for the Tenth Circuit. Additionally, that error was committed is not in doubt. Whether the error was waived and prejudice suffered are the only remaining areas of dispute.

The waiver question deserves this Court's attention because it is caught up in an area that is complicated, as seen by the procedural and evidentiary rules that have been developed to resolve sanity issues, and pervasive. Since the evidentiary rules are ultimately grounded upon preservation of an accused's protection from self-incrimination under the Fifth Amendment, the issue presented achieves greater significance. Point II develops the injustice suffered by petitioner when his own statements were used against him in violation of the Constitution.

II

The main thrust of the petitioner's case is that while the Court of Military Appeals was correct in ruling that petitioner's statements were protected under Mil.R.Evid. 302(a), the court erred to the prejudice of the petitioner by ruling that "any privilege that Bledsoe enjoyed under Mil.R.Evid. 302 was waived by reason of the defense

failure to particularize its objection, as required by Mil.R.Evid. 103(a)(1)." *Bledsoe, supra,* at 103.

In *Estelle v. Smith,* 451 U.S. 454 (1981), this Court ruled that the Fifth Amendment right against self-incrimination is violated when unwarned statements given by a defendant to a psychiatrist in the context of a court ordered competency hearing are used by the prosecution to determine guilt or punishment. *See, e.g., United States v. Alvarez,* 519 F.2d 1036 (3d Cir. 1975) (court ruled use of statements elicited during court ordered psychiatric examination to establish fact of offense violates privilege against self-incrimination).

Petitioner contends that in order to be constitutionally valid, Mil.R.Evid. 302(a) must be applied in accordance with this Court's decision in *Estelle.* Petitioner further contends that the Court of Military Appeals is bound by this Court's determination that a defendant does not automatically waive his right, granted under *Estelle,* by failing to make a timely, *specific* objection to testimony that violates this right. *Estelle, supra,* note 12 at 469. *But see United States v. Dysart,* 705 F.2d 1247 (10th Cir. 1983) (court ruled that defense's failure to specifically object to doctor's testimony concerning what accused confided to him during court ordered sanity inquiry waived the Fifth Amendment issue), *cert. denied,* 464 U.S. 934 (1983).

This case is easily distinguishable from *Dysart.* While the defense counsel in *Dysart* apparently knew of the doctor's proposed testimony and tactically allowed it, defense counsel in petitioner's case was not notified that the prosecution knew about petitioner's statements until the prosecution mentioned the statements at his trial.[6] *Id.* at 1253-1255. As the United States Court of Appeals, Fifth

---

[6] The Court of Military Appeals acknowledged the prosecution's duty and failure to disclose this information in a timely fashion. *Bledsoe, supra* at 102.

Circuit, stated in *Smith v. Estelle,* 602 F.2d 694, note 19 at 63 (5th Cir. 1979), in ruling that accused's failure to object did not constitute waiver, with respect to surprise, "counsel can scarcely be faulted for failing to enumerate all of the many constitutional rights that the state violated when it unexpectedly presented Dr. Grigson's testimony." This Court adopted the Fifth Circuit's position on waiver. *Estelle* v. *Smith, supra,* note 12 at 469. Therefore, petitioner's timely objections, though lacking complete specificity, preserved his constitutional claim.

The reliance by the Court of Military Appeals on Mil.R.Evid. 103(a)(1) is also misplaced given the language of the rule itself. First, there is no question that the objections made by defense were timely. The objections were voiced when the evidence was initially offered. Second, a specific ground must be stated "if the specific ground was not apparent from the context." Mil.R.Evid. 103(a)(1). The record of trial discloses that the prosecution explicitly requested access to petitioner's statements and ended by referring to "Rule 302." The very next words uttered by defense counsel were, "We object, Your Honor." (R. 218). The colloquy that followed also included references to paragraph 121, M.C.M. (1969) (Rev.), the governing procedural rule, as well as to relevancy and the prejudicial aspects of admitting petitioner's statements. However inartful the objections may have been, under the circumstances they more than sufficed.

It cannot be overstated that the prosecution obtained petitioner's statements in violation of the rules and failed to disclose possession of these same statements in violation of the rules. In effect, the statements were held back only to be employed in ambushing a defense-called witness, and, even then, improperly. To now bind the defense,

after such questionable conduct by the prosecution, to a hypertechnical application of Mil.R.Evid. 103(a)(1), defies description.

Clearly, the erroneous use of petitioner's statements assumes constitutional dimension. It is well settled that before error founded upon the United States Constitution can be held harmless, the Court must be able to say it was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967). The Court of Military Appeals made no reference to this standard in ruling against petitioner. Applying this standard, petitioner maintains the error was not harmless. The government impermissibly used petitioner's statements to establish the requisite intent to commit larceny. Additionally, can it fairly be said that, in this case where petitioner did not take the stand, his words, "I am going to beat this rap," did not work to generally discredit his defense? How much more injury was suffered since these words were elicited from a defense-called expert witness? Without petitioner's statements, the government may well not have been able to establish guilt.

CONCLUSION

The proper application of *Estelle v. Smith, supra,* is as critical in military cases as it is in civilian. Additionally, waiver of constitutional rights must be resolved consistently by all courts. The close parallel between the federal and military rules of evidence and procedure make petitioner's case an important case for insuring that these rules, in light of this Court's opinions and the Constitution, are correctly followed. For all these reasons, the petition for a writ of certiorari should be granted.

LEO L. SERGI
Colonel, Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

and

FRANK J. SPINNER
Major, Office of The Judge Advocate General
United States Air Force

Counsel for Petitioner

July 1988

APPENDIX

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 51,478
ACM 23926

UNITED STATES, APPELLEE

v.

KIRBY D. BLEDSOE, JR., AIRMAN FIRST CLASS,
U.S. AIR FORCE, APPELLANT

May 9, 1988

For Appellant: *Captain Timothy J. Malloy* (argued); *Colonel Leo L. Sergi* (on brief).

For Appellee: *Major Joseph S. Kistler* (argued); *Colonel Kenneth R. Rengert* (on brief).

OPINION OF THE COURT

EVERETT, Chief Judge:

Contrary to his pleas, a general court-martial with members found Bledsoe guilty of larceny on July 14, 1982, and of willfully damaging military property twice on December 30, 1982, in violation of Articles 121 and 108 of the Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 908, respectively. The court sentenced appellant to a dishonorable discharge, confinement for 30 months, forfeiture of $400.00 pay per month for 30 months, and reduction to the lowest enlisted grade. The findings and sentence were approved by the convening authority.

After his trial, Bledsoe petitioned the United States Air Force Court of Military Review for a new trial on the basis of new evidence as to his mental responsibility.[1] In response to this new evidence, the Court of Military Review set aside the convening authority's action and authorized further inquiry into appellant's sanity. 16 M.J. 977.

After that inquiry had taken place, a partially different panel of the Court of Military Review concluded: "We find no reasonable doubt as to the sanity of the accused at the relevant times; and we are convinced that, considering all the data presented, no different verdict would reasonably result were a new trial to be ordered." Accordingly, the request for a new trial was denied. *United States v. Bledsoe,* (unpub. order of June 22, 1984 at 1).[2]

In a subsequent opinion, *United States v. Bledsoe*, 19 M.J. 641 (1984), the Court of Military Review rejected appellant's legal contentions and affirmed the findings; but it reduced the sentence to a bad-conduct discharge, confinement for 20 months, forfeiture of $397.00 pay month for

---

[1] In December 1982, a sanity board at Wilford Hall, Texas, had evaluated appellant in preparation for his trial on the larceny charge; and it had determined that he was competent to stand trial and had been mentally responsible at the time of the alleged offense. At his trial in February 1983, psychiatric evidence had been presented with respect to his mental responsibility on December 30—the date of the willful damage to military property alleged in the additional charge—and this issue was disposed of adversely to him. Subsequently, Dr. Wooten, the psychologist who had tested Bledsoe in connection with a sanity board evaluation, changed his original opinion that appellant was mentally responsible. This change was the new evidence on which Bledsoe especially relied in petitioning for a new trial.

[2] In light of our opinion in *United States v. Lilly*, 25 M.J. 403 (C.M.A.1988), we see no reason to disturb the decision by the court below denying appellant's petition for new trial.

20 months, and reduction to the lowest enlisted pay grade. Upon appeal to this Court, we granted review of these two issues:

I

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ALLOWING THE PROSECUTION TO INTRODUCE EXPERT PSYCHIATRIC TESTIMONY IN ITS CASE-IN-CHIEF AND PRIOR TO THE DEFENSE INTRODUCING EXPERT TESTIMONY [MIL.R.EVID. 302(b)(2)].

II

WHETHER THE MILITARY JUDGE ERRED TO THE PREJUDICE OF THE SUBSTANTIAL RIGHTS OF APPELLANT BY ALLOWING THE PROSECUTION TO ELICIT TWO STATEMENTS MADE BY APPELLANT TO A PSYCHIATRIST DURING HIS PARAGRAPH 121, M.C.M. 1969 (REVISED) EVALUATION.

I

Bledsoe was alleged to have stolen property of two fellow airmen on July 14, 1982, at Kelly Air Force Base, Texas. After having been charged with this offense, he went on leave to Houston, Texas, purportedly to see a civilian attorney in connection with his case. Once there, he committed himself to a civilian mental ward; and later he was transferred to the Air Force Regional Medical Center at Wilford Hall, Texas. There a sanity board was convened, which reported on December 22 that Bledsoe had a conversion disorder and also that he was malingering.

Appellant was advised of this report on December 29; and at that time he, presumably, was made aware that he would be returned to Kelly Air Force Base for trial on the larceny charge. The next day Bledsoe damaged the hospital room to which he had been assigned at Wilford Hall; and later that day, after being returned to Kelly Air Force Base, he damaged his dormitory room there. These acts were the basis for an additional charge with two specifications alleging willful damage to military property.

At an initial Article 39(a)[3] session, Bledsoe appeared non-responsive and incoherent in his responses to inquiries from the military judge. As a result, the judge proceeded to take evidence about his capacity to stand trial. After hearing testimony from Dr. Thomas Martin and Dr. Wallace Robert Townsend-Parchman—two psychiatrists who had served on the sanity board convened at Wilford Hall to evaluate appellant as to the larceny charge—the military judge ruled that Bledsoe was competent to stand trial.

Later during the Article 39(a) session, the military judge asked trial counsel about his intention to produce expert testimony during the Government's case-in-chief. The response was that the prosecutor's plans were "conditioned upon the accused's demeanor raising that issue, sort of in a play-that-by-ear situation." In any event, trial counsel "anticipat[ed] bringing no more than one psychiatrist," who "would be Townsend-Parchman, the treating physician." Defense counsel expressed no objection to such evidence; and he indicated to the military judge that his own anticipated experts were Dr. Martin and Dr. Newsome,

---

[3] Uniform Code of Military Justice, 10 U.S.C. § 839(a).

another psychiatrist, who would discuss the effects of alcohol.[4]

Subsequently, during *voir dire* of the court members, defense counsel asked about the receptiveness of the court members to a defense that Bledsoe lacked mental responsibility on December 30 when the military property was damaged. However, counsel did not state that he intended to call expert witnesses to testify about mental responsibility.

During his opening statement, assistant trial counsel outlined the government witnesses to be called and their expected testimony. In this connection, he stated that Dr. Townsend-Parchman would testify about the results of a sanity board. When this opening statement had ended, defense counsel asked for a mistrial on the grounds that "it is very improper for the Government to talk about the sanity issue here. The only sanity defense, . . . or any type of evidence whatsoever of such a defense coming out in the trial should be by the Defense. . . . The Government has commented upon it and that is highly prejudicial." Defense counsel also indicated that mental responsibility was not an issue as to the larceny charge but only with respect to the alleged damage to military property. The motion for mistrial was denied; and the military judge commented that "his mental state as it relates to the offenses is up to the fact finders. I don't see any possible prejudice from him laying that out. I think, matter of fact, it even clarifies it."

Ultimately, Dr. Townsend-Parchman did testify for the Government in its case-in-chief; and the defense offered

---

[4] As to the larceny charge, the defense contended that appellant had not taken the property and also that he had been too drunk to entertain the requisite specific intent.

no objection to his testimony. Subsequently, the defense called Dr. Martin, who testified that he and the other two members of the sanity board had concurred in the diagnosis that Bledsoe had a "conversion disorder" even before the larceny in July. Dr. Martin had reviewed appellant's hospital records and family history, but he said that "[w]e got very little information from Airman Bledsoe." Dr. Martin could not offer "a good answer" as to whether, in light of the conversion disorder, appellant's damage to the two rooms on December 30 "was willful."

At the end of the direct examination of this witness, trial counsel

> ask[ed] for an opportunity to review the sanity board since there has been sufficient opening of that door by the testimony of Doctor Martin as to the history of the accused, particularly the statements made by the accused in the evaluation process and the Government would request permission for access to whatever statements he might have made, so we can conduct an effective cross-examination of this witness. That is Rule 302.

The defense objected and contended that Dr. Martin's testimony had not opened "any door for the Government to go behind and see what the sanity board had to say whatsoever." After reviewing the sanity board's entire summary, the military judge overruled the defense objection and provided the sanity board documents to the prosecutor.

Trial counsel then remarked:

> During the course of my investigation, by talking to Doctor Martin and talking to Doctor Townsend-Parchman, there were certain statements made by the accused during the course of the evaluation underlying the sanity board. These statements were made to these doctors and they were made known to me. Be-

> ing aware of the restrictions of paragraph 121 of the Manual, however, they were not mentioned before, and I have not used this information in any way up to this point. However, it is the Government's contention that the door has been opened by Defense by asking Doctor Martin about the background history related to him by the accused and this clearly would indicate verbal statements both by the accused and by the accused's wife during the course of the sanity proceedings and the Government at this time would like to make an offer of proof as to those statements.
>
> * * * * * *
>
> The one statement that was given to Doctor Martin earlier in his evaluation dealt with financial problems that the accused and his wife were experiencing and, of course, the relevancy of this is the Government contends that financial problems underlie the larcenies. Secondly, the accused stated to Doctor Townsend-Parchman, in the presence of Doctor Martin, "You are not going to get me on this offense. I'm going to beat this rap." That goes to his entire motivation, and checking himself in a hospital in Houston, which supports the Government's theory of what we have here is an attempt to avoid prosecution.

The defense objected that evidence of Bledsoe's statements would be prejudicial and lacking in probative value. The military judge, concluding that "the Defense has opened the door," overruled the objections.

On cross-examination by the prosecutor, Dr. Martin testified that Bledsoe had been "having considerable financial difficulties and as he put it, he was receiving a lot of pressure from his wife to obtain funds." In response to questions by trial counsel, Dr. Martin also testified that on December 15, 1982, he had overheard Bledsoe talking to

Dr. Townsend-Parchman in the hallway of a hospital ward. As he "was passing by . . . [he] heard Airman Bledsoe comment to Dr. Townsend-Parchman that, 'I am going to show you guys. I am going to beat this rap' something to that effect and I did not stand around and listen to the rest of the conversation."

After all the evidence was received and counsel had presented closing arguments, the military judge gave extensive instructions to the court members. With respect to the alleged larceny, he did not advise the members as to mental responsibility, since appellant had defended against that charge only on the grounds that he had not taken the property and that at the time he had been too intoxicated to form a specific intent. However, as to the charge of willful damage to the two rooms, the military judge instructed not only on mental responsibility but also on partial mental responsibility as it might affect the element of willfulness. The members deliberated only half an hour before returning their findings of guilty.

II

Mil.R.Evid. 302(b)(2), Manual for Courts-Martial, United States, 1969 (Revised edition), as originally promulgated, provided: "An expert witness may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused, but such testimony may not extend to statements of the accused except as provided in (1)." However, prior to appellant's trial, the Rule was revised to read: "An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if *expert testimony offered by the defense as to the mental condition of the accused has been received in evidence,* but such testimony may not ex-

tend to statements of the accused except as provided in (1)."[5] (Emphasis added.) This amendment clearly manifested an intent that prosecution experts should testify as to the accused's sanity only after the defense experts had testified. *See also* S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 65 (1981); *see* at 116 (1986).

Although Mil.R.Evid. 302(b)(2) dictates the usual sequence for the presentation of expert testimony as to sanity, it is subject to exceptions. For example, if read literally, the Rule would imply that the Government could not offer any expert testimony as to an accused's sanity, if the defense did not offer its own expert testimony and, instead, relied only on lay testimony to raise the sanity issue; but we are sure that, in amending Mil.R.Evid. 302(b)(2), the drafters never intended to mandate such a result.

Moreover, we cannot disregard Mil.R.Evid. 611(a), which provides:

> The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment and undue embarrassment.

Under this Rule—to which the Court of Military Review also called attention in its opinion—we are convinced that a military judge has some discretion as to the sequence in which expert witnesses testify about an accused's sanity.

This discretion, however, is not unlimited; and so far as we can determine, the military judge did not exercise his discretion in an informed manner. Instead, he apparently

---

[5] Mil.R.Evid. 302(b)(1) states: "There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence."

proceeded on the premise that the Government was free to present its evidence in whatever sequence it chose. Moreover, nothing in the record indicates that the prosecution called Dr. Townsend-Parchman in its case-in-chief for any of the reasons set forth in Mil.R.Evid. 611(a). Instead, this order of presentation probably was designed to gain the tactical advantage of making the court members aware as soon as possible that the experts had come to the conclusion that appellant was malingering.

Even though the presentation of expert testimony should have followed the sequence contemplated by Mil.R.Evid. 302(b)(2), we perceive no prejudice to appellant. Of course, appellant never claimed that he lacked mental responsibility for the larceny; and, instead, he defended on other grounds. Thus, as to this charge, he was unaffected by the error.

With respect to the willful-damage charge—as to which issues were raised of both mental responsibility and partial mental responsibility—we also are convinced that no prejudice was suffered. Both Dr. Townsend-Parchman and Dr. Martin agreed on the basic diagnosis of conversion disorder and malingering; and we see no great disadvantage to appellant because the Government's witness expressed his opinion on this score before the defense witness did so. Moreover, there is no indication that any change in the defense presentation of its evidence resulted from the Government's having called Dr. Townsend-Parchman to testify in its case-in-chief.

Furthermore, the defense did not preserve the issue effectively. *See* Mil.R.Evid. 103(a)(1). The objection and motion for mistrial were made with respect to the assistant trial counsel's opening statement about the evidence he planned to offer. No objection as to Dr. Townsend-Parchman's testifying was made by the defense when he

appeared as a witness during the Government's case-in-chief.

III

Mi.R.Evid. 304(d)(1) requires: "Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces." In this case, trial counsel informed the military judge that, while talking with Drs. Martin and Townsend-Parchman, he had learned about two statements by Bledsoe. It seems clear from the record that the prosecutor had not informed defense counsel about these statements until he sought to use them in cross-examining Dr. Martin. Possibly trial counsel learned about the statements after arraignment; and if so, this information did not fall within the terms of Mil.R.Evid. 304(d)(1). Instead, under Mil.R.Evid. 304(d)(2)(B), trial counsel was under a duty to "provide timely notice to the military judge and to the counsel for the accused" if he formed an intent to offer the statement in evidence.

The defense did not enter any objection on grounds of untimely notice; and it did not request a continuance or other relief by reason of surprise. Instead, the defense objection centered on lack of relevance and probative value under Mil.R.Evid. 401 and 403; and so any prosecution failure to provide "timely notice" was waived.

Mil.R.Evid. 302(a) grants an accused "a privilege to prevent any statement made by the accused in a mental examination ordered under" the Manual for Courts-Martial "and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sen-

tencing proceedings." The privilege disappears, however, "when the accused first introduces into evidence such statements or derivative evidence."[6]

The privilege against use by the prosecution of any statement made by an accused in a mental examination signifies that such statement would not be revealed to the prosecution by the doctors who performed the sanity evaluation. Apparently, this obligation of confidentiality was violated.

The defense, however, did not move to disqualify trial counsel because of his receipt of privileged information. Moreover, trial counsel specifically represented that he had "not used this information in any way up to this point." We have no reason to doubt this representation by counsel; and certainly nothing in the record indicates that trial counsel's misacquired knowledge of Bledsoe's statements affected the preparation of the Government's case in any way. Thus, we need only focus on whether the military judge committed prejudicial error by allowing trial counsel to cross-examine Dr. Martin about appellant's two statements.

An accused opens the door for use of his otherwise privileged statements made during a mental examination if

---

[6] Fed.R.Crim.P. 12.2(c) has a comparable provision whereunder a mental examination may be ordered upon motion by the Government, and no statement made by the defendant during this examination "shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony." As noted in *Estelle v. Smith*, 451 U.S. 454, 465-66, 101 S.Ct. 1866, 1874, 68 L.Ed.2d 359 (1981), a plea of insanity, coupled with use of psychiatric testimony, may waive the defendant's Fifth Amendment privilege with respect to use of information obtained in a mental examination for litigating the issue of sanity.

he "first introduces into evidence such statements *or derivative evidence.*" Mil.R.Evid. 302(b)(1) (emphasis added). Bledsoe's statements had not been introduced by the defense; but the Government claims that Dr. Martin's testimony as a defense witness was, at least in part, "derivative evidence."

We are unsure how broad this term was intended to be. We doubt that the diganosis offered by a defense expert can, in and of itself, be considered "derivative evidence" merely because it is based in part on what the accused has told the examining psychiatrists. Otherwise, in virtually every instance in which the defense offered expert testimony as to sanity, the expert witness could be cross-examined about every statement the accused had made to him. On the other hand, "derivative evidence" seems broad enough to include any factual information provided to the evaluators by an accused.

During the direct examination of Dr. Martin, he had testified about "stresses" to which Bledsoe was subject; and, in this connection, he mentioned "financial obligation"; and trial counsel apparently considered that this reference opened the door for his asking Dr. Martin about any statement by Bledsoe concerning his financial affairs. As we read the record, the basis for this contention is weak, because Dr. Martin's reference to appellant's financial status was minimal.

With respect to appellant's statement to Dr. Townsend-Parchman concerning his intent to "beat the rap"—a statement which Dr. Martin had overheard in the hallway—the Government contends that Mil.R.Evid. 302 is not even involved. The premise for this contention is that Bledsoe's statement was not made pursuant to a compelled sanity examination. We cannot accept the premise, because it relies on an unduly fine distinction. Bledsoe was at Wilford Hall

for a sanity evaluation and talked to various psychiatrists from time to time. We assume that every remark that he made to the psychiatrists might have been taken into account in evaluating his sanity; and this would be true whether a remark was made in the context of a formal interview or instead was part of a chance encounter. It suffices that the remark was made to a member of the sanity board, Dr. Townsend-Parchman, even though Dr. Martin, another board member, had only overheard it.

Even though appellant may have been entitled to prevent use of the two statements in cross-examining Dr. Martin, we do not believe that prejudicial error was committed. In the first place, the two statements would have had minimal impact on the factfinder's determination of guilt or innocence, including mental responsibility. More importantly, any privilege that Bledsoe enjoyed under Mil.R.Evid. 302 was waived by reason of the defense failure to particularize its objection, as required by Mil.R.Evid. 103(a)(1). The only objection was on grounds that the statements lacked relevance and probative value; and since no claim of privilege was asserted at trial, it cannot be asserted now on appeal.

IV

The decision of the United States Air Force Court of Military Review is affirmed.

Judge COX concurs.

SULLIVAN, Judge (concurring):

I agree with the majority opinion that prejudicial error did not occur in this case. I would add, however, that Mil.R.Evid. 302(b)(1) must be read and applied in light of *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). *See* Fed.R. Crim.P. 12.2(c). *See also United States v. Parker*, 15 M.J. 146 (C.M.A.1983).

APPENDIX B-1

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 23926
and
Misc. Dkt. No. 83-06

UNITED STATES

v.

AIRMAN FIRST CLASS KIRBY D. BLEDSOE, JR.,
FR 459-27-1207 UNITED STATES AIR FORCE

---

30 September 1983

Sentenced adjudged 24 February 1983 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Kenneth D. Randall.

Approved sentence: Dishonorable discharge, confinement at hard labor for thirty (30) months, forfeiture of four hundred dollars ($400.00) per month for thirty (30) months, and reduction to airman basic.

Appellate Counsel for the Accused: Colonel George R. Stevens and Major Richard A. Morgan. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Captain Brenda J. Hollis.

Before: KASTL, RAICHLE and SNYDER Appellate Military Judges

DECISION

Kastl, Senior Judge:

In the face of telling professional opinion questioning the accused's mental state, we return this case for further inquiry into his mental capacity and responsibility

Facts

The accused was convicted of larceny and damage to property of the United States, in violation of Articles 121 and 108, U.C.M.J. His sentence extends to a dishonorable discharge, confinement at hard labor for 30 months, and accessory penalties.

The facts bearing on this issue are set forth in the able appellate defense brief:

> During an Article 39(a) session prior to arraignment, the military judge conducted an inquiry into the petitioner's competence to stand trial. This inquiry was due to the petitioner's failure to respond to the military judge's questions concerning whether or not he understood his rights to counsel. When the petitioner did respond, his responses in the record of trial appear garbled or unintelligible.
>
> The prosecution presented the military judge with Prosecution Exhibit 1, a copy of the Sanity Board report. They also called Dr. (Lt. Colonel) Thomas A. Martin, III, as a witness. Dr. Martin testified that he is the Chief of In-Patient Psychiatry at Wilford Hall Medical Center. He was one of the staff psychiatrists involved in the Sanity Board proceedings pertaining to the petitioner. He diagnosed the petitioner as having symptoms of a conversion disorder and malingering. In his opinion the conversion disorder was the predominant symptom. Dr. Martin explained that

malingering is an unconscious process. The conversion symptoms that the petitioner exhibited were an unusual gait and stance, a very unusual form of stuttering, and atasia (stumbling about).

The petitioner was evaluated by neurologists, a speech pathologist and a psychologist. There was no organic origin for his symptoms. The initial psychological testing done by Dr. Wooten, Chief Psychologist, Wilford Hall Medical Center, resulted in a diagnosis of malingering.

A conversion disorder is not a character and behavior disorder or a psychosis, but is a neurosis. The Sanity Board concluded that the conversion disorder was present at the time of the alleged larceny.

During his initial evaluation at Wilford Hall, the petitioner's symptoms fluctuated widely from being nearly catatonic to being someone who had just as much energy as anyone else.

Dr. Martin expressed his belief that the petitioner had sufficient mental capacity to understand the nature of the proceedings in the court-martial and the ability to cooperate or to conduct an intelligent defense.

The defense called Airman Basic Rex Anderson, a former inmate at the Consolidated Detention Facility, Lackland Air Force Base, as a witness on the issue of the petitioner's competence to stand trial. Anderson was confined with the petitioner from 1 January until 14 February 1983. He noticed that the petitioner sometimes got emotionally upset in his cell and cried. The petitioner was also frightened of things that had motors, such as the washing machine and the floor buffer. He noticed the petitioner often appeared to be

mumbling and talking to non-existent people. Anderson further stated that the petitioner would sometimes play in the commode or urinal after he had used it and would also say he saw purple people.

Although it is not reflected in the record of trial, the staff judge advocate pointed out, in his post-trial review, that the demeanor of the petitioner during portions of the trial might also have raised the issue of sanity in the minds of the court members because he, at times, appeared to shake uncontrollably, had a blank stare, and what appeared to be involuntary movements, such as foot shuffling and leg jerking. (Staff Judge Advocate Post-Trial Review, pages 22, 30).

The Sanity Board was unable to determine whether the petitioner had a personality disorder because he was not cooperative. Dr. Martin felt there may have been a mixed personality disorder. This would have been an anti-social personality or what in the past has been called a sociopathic or psychopathic personality. This is the type of person who cannot conform his behavior to the usual norms of society, tends to be amoral, remorseless, and without guilt for actions he has performed against society. The petitioner also exhibited a dependent personality and a schizotype personality. He reported seeing purple people or chickens pecking on his skin and played with fecal materials while in the confinement facility. A schizo personality is one where the individual's thinking is a little bit different than the norm and involves the type of person who tends to say and do unusual things. In Dr. Martin's opinion, the conversion disorder was the most prominent symptom during the petitioner's hospitalization.

In his *Goode* response, the trial defense counsel pointed out that the Government, at the petitioner's pretrial confinement hearing, had argued that he was a danger to himself because of his mental condition and produced the testimony of a clinical psychologist and a staff psychiatrist. One of the reasons that the petitioner was continued in pretrial confinement was because he presented a danger to himself and others. The investigating officer, at the second Article 32 investigation, [a military judge] pointed out, in his report of 18 January 1983, that the "accused's responses at the investigation were barely comprehensible and sometimes unintelligible" (¶10c, page 3, Investigating Officer Report). The investigating officer stated that he believed the petitioner "did not fully comprehend the nature of the proceedings." He described his observations of the petitioner as "an experience I shall never forget." (¶18c, page 4, Investigating Officer Report).

In his post-trial review, the staff judge advocate agreed that it was "clear that the accused did have a mental disease or defect, namely, a conversion disorder . . ." (SJA Review, page 29). However, it was the SJA's belief that the petitioner nevertheless did not lack substantial capacity to form the specific intent necessary to commit the offenses charged [page references omitted].

Basis For New Trial Request

Based on these facts, the appellate defense counsel petition this Court for a new trial under Article 73, U.C.M.J., noting that we may also wish to order a new sanity board as well.

In his Affidavit In Support of Petition for New Trial, Lieutenant Colonel Wooten concludes as follows:

> I am now of the opinion that [the accused at trial] was then incapable of cooperating and assisting in his own defense on a reasonably intelligent basis. I also judge him to be less than fully mentally competent at the time of the offenses.

Colonel Wooten had seen the accused in about 12 sessions of psychotherapy. He now concludes that his initial consultation and final diagnosis "while not in error, were incomplete." Colonel Wooten's initial contact with the accused had led him "to the opinion that he was competent."

Appellate defense counsel urge that such information raises a substantial doubt as to the accused's sanity at the time of the offenses and at trial. They contend that trial defense counsel did all he could to inquire into the accused's sanity pretrial, and the information before us now is newly discovered evidence thus entitling the accused to a new trial.

Analysis

Military law accords insanity a preferred status. *United States v. Babbidge,* 18 U.S.C.M.A. 327, 40 C.M.R. 39, 41 (1969); *United States v. Carey,* 11 U.S.C.M.A. 443, 29 C.M.R. 259 (1960). There are three district stages when the issue of the accused's sanity, if reasonably raised, should be the subject of inquiry: (1) at the time of the commission of the offense; (2) at the time of trial; and (3) at time of appellate review. *United States v. Thomas,* 13 U.S.C.M.A. 163, 32 C.M.R. 163 (1962). Of course, if an accused is found to be insane at the time of appellate review, the appellate proceedings are tolled. *United States v. Korzeniewski,* 7 U.S.C.M.A. 314, 22 C.M.R. 104 (1956). Further inquiry into the accused's mental condition

is required when it appears warranted in the interest of justice, regardless of whether the question was raised at trial or how it was determined if raised. M.C.M., 1969 (Rev.), para. 124. *See United States v. Walker,* 20 U.S.C.M.A. 241, 43 C.M.R. 81 (1971).

In the case *sub judice* the information available to us creates a sufficient doubt to warrant further inquiry into the accused's mental capacity at the time of the commission of the offenses and time of trial. *United States v. Triplett,* 21 U.S.C.M.A. 497, 45 C.M.R. 271 (1972). Hence, we set aside the convening authority's action and return the case.

The covening authority may institute a further sanity inquiry consistent with this decision. Any additional sanity proceeding will specifically review and determine, in accordance with M.C.M., para. 121:

1. The accused's mental responsibility for the offenses of which he was convicted;

2. The accused's mental capacity during his court-martial; and

3. The accused's present mental capacity as it relates to the appellate process.

If the results of these proceedings demonstrate the accused's mental capacity and responsibility, a new staff judge advocate's review should be prepared and furnished to accused's counsel pursuant to *United States v. Goode,* 1 M.J. 3 (C.M.A. 1975).

If: (a) further sanity study is not feasible for any reason; or (b) during the course thereof or after its completion the supervisory authority is satisfied that the accused lacked or lacks mental capacity or responsibility; or (3) for any other reason the prosecution should be terminated, the convening authority may dismiss the charges and specifications.

The action of the convening authority is set aside and the record of trial is returned to The Judge Advocate General, United States Air Force, for return to the convening authority.

SNYDER, Judge concurs. RAICHLE, Judge, absent.

OFFICIAL

/s/ CAROLE V. PETTI
CAROLE V. PETTI
Clerk of Court
Court of Military Review

APPENDIX B-2

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

MISCELLANEOUS DOCKET NO. 83-06
ACM 23926

UNITED STATES

v.

AIRMAN FIRST CLASS KIRBY D. BLEDSOE, JR.,
FR 459-27-1207

---

22 June 1984

ORDER

KASTL, Senior Judge:

In *United States v. Bledsoe,* 16 M.J. 977 (A.F.C.M.R. 1983), we held that psychiatric information available on appeal created sufficient doubt so as to warrant further inquiry into the accused's mental capacity at time of the commission of the offenses of which he was convicted and at time of his trial. Accordingly, we set aside the convening authority's action and returned the case for such further inquiry.

That inquiry has now occurred. The accused advanced the testimony of various witnesses as to his mental capacity and responsibility; in addition, a new sanity board, consisting of five members, found that the accused possessed sufficient mental capacity to commit the offenses and to be tried for them and that he currently enjoys sufficient mental capacity to participate intelligently in his appeal.

After hearing oral argument on the accused's petition for a new trial, we have reached our conclusions.* We find no reasonable doubt as to the sanity of the accused at the relevant times; and we are convinced that, considering all the data presented, no different verdict would reasonably result were a new trial to be ordered. *United States v. Triplett,* 21 U.S.C.M.A. 497, 45 C.M.R. 271, 277 (1972); *United States v. Norton,* 22 U.S.C.M.A. 213, 46 C.M.R. 213, 217 (1973); *United States v. Chambers,* 47 C.M.R. 469 (A.F.C.M.R. 1973).

---

*The unopposed defense Motion for Leave to File Additional Documents, dated 17 April 1984, is GRANTED. The defense Motion to File Document and Supplementary Brief in Support of Petition for New Trial, dated 12 March 1984, is GRANTED.

Weighed under the standard set by paragraph 124 of the Manual for Courts-Martial, 1969 (Rev.), the request for a new trial is DENIED.

CANELLOS and RAICHLE, Judges, concur.

OFFICIAL

/s/ LEO B. WEGEMER
LEO B. WEGEMER
Captain, USAF
Chief Commissioner

APPENDIX B-3

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 23926 (f rev)

UNITED STATES

v.

AIRMAN FIRST CLASS KIRBY D. BLEDSOE, JR.,
FR 459-27-1207 UNITED STATES AIR FORCE

---

26 October 1984

Sentenced adjudged 24 February 1983 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Kenneth D. Randall.

Approved sentence: Dishonorable discharge, confinement at hard labor for thirty (30) months, forfeiture of four hundred dollars ($400.00) per month for thirty (30) months, and reduction to airman basic.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Captain Timothy J. Malloy. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Captain Kevin L. Daugherty.

Before: HODGSON, FORAY and MURDOCK Appellate Military Judges

DECISION UPON FURTHER REVIEW

HODGSON, Chief Judge:

The principal issues before us are the appellant's mental condition and the procedure by which this evidence was

presented to the members, together with the prosecution's pretrial knowledge of statements made by the appellant during the sanity inquiry. We find no error to warrant setting aside the appellant's conviction. However, to better understand the assigned errors a brief discussion of the facts and appellate history would be helpful.

I

The circumstances surrounding the offenses at bar are not complicated. The record disclosed that on 14 July 1982, the appellant took, without permission, various personal items, i.e., a color television set, camera, lens, etc., from two airmen living in the barracks. Some five months later, 30 December 1982, he did considerable damage to the hospital room where he was assigned and to his room in the barracks. Prior to trial the appellant met a Sanity Board which concluded that he was suffering from a conversion disorder[1] and malingering—the conversion disorder being the predominant symptom. He did not lack the capacity to appreciate the criminality of his conduct and could conform his conduct to the requirements of law. He was diagnosed as competent to stand trial.

At trial he defended the larceny allegation on the lack of credible evidence coupled with an assertion that he was too intoxicated to form the required intent, and argued that he lacked the necessary mental responsibility to be held accountable for his actions in damaging property of the

---

[1] A conversion disorder is a pseudo-neurological symptom that results in such difficulties as "walking," loss of vision, loss of speech, loss of feeling in a part of the body, blocking of memory, etc. It is not a character and behavior disorder or a psych ..s, but is a neurosis. The Sanity Board was unable to determine v nether the appellant had a personality disorder because he was not cooperative.

United States. The members were given both defense theories with full and complete instructions.

Subsequent to his conviction, the appellant, on 22 June 1983, petitioned this Court for a new trial. See Article 73, U.C.M.J. In support of this petition he filed a post-trial affidavit from a clinical psychologist who stated that his earlier diagnosis "while not in error, [was] incomplete." This individual was now of the opinion that the appellant was "less than fully mentally competent at the time of the offenses." Appellate defense counsel maintained that this information together with the evidence of record raised a substantial doubt as to the appellant's sanity at the time of the offenses and at trial. They contended the evidence was newly-discovered and likely to produce a different result had it been known at trial, thus requiring that the appellant be given a new trial.

In our original review, we considered the available information from all sources to be sufficient to justify a further inquiry into the appellant's medical condition. Accordingly, we set aside the convening authority's action, and gave him the option of instituting further sanity proceedings consistent with our opinion or dismissing the charges. *United States v. Bledsoe,* 16 M.J. 977 (A.F.C.M.R. 1983). A second Sanity Board was convened on 15 November 1983. This Board determined that at the time of the offenses of which the appellant was convicted he had no mental disease or defect, and had no mental disorder that would warrant a medical separation. The psychiatric diagnosis included symptoms of malingering, mixed personality disorder with antisocial and schizoid features and severe psychosocial stress. The Board concluded by stating that the appellant was aware of the criminality of his actions and could conform them to the requirements of law.

After hearing oral argument on the Petition for New Trial, we found no reasonable doubt as to the sanity of the appellant at the relevant times. Accordingly, on 22 June 1984, it was denied. The appeal is now before us for consideration of assigned errors.

II

Appellate counsel contend the trial judge committed prejudicial error in allowing the prosecution to put on expert psychiatric testimony in its case prior to the defense offering any evidence of the issue on insanity. The record reveals that the appellant's mental state was considered a major issue early in the proceedings with the judge hearing evidence as to the accused's mental capacity to stand trial. Two psychiatrists who were members of the Sanity Board which had earlier examined the appellant testified that he had sufficient mental acumen to understand the proceedings and could cooperate in his defense. After considering this testimony and hearing argument the trial judge ruled that the appellant was competent to stand trial.

During an out-of-court session to discuss preliminary matters, defense counsel indicated that Doctor Martin, a military psychiatrist who had earlier testified as to the appellant's capacity to stand trial, would attest that the appellant was not able to control his behavior in formulating the specific intent required to cause "willful damage to government property." Later, during *voir dire* of the members, the defense made it clear that their client's lack of mental responsibility was a key issue as to the damage to government property allegations, and that a defense based on that condition would be urged in his behalf.

After Government counsel suggested in his opening statement that the appellant was free from any mental defect or disease that might affect him being held accountable for his actions, and that the prosecution would offer evidence to support this, individual defense counsel asked for a mistrial, urging that a "sanity defense" should be initiated by the defense, not the government. The trial judge denied the mistrial and allowed the prosecution to offer evidence establishing the appellant's sanity during it case in chief.

Appellate counsel contend the judge's ruling was erroneous and resulted in prejudice in two areas. First, it allowed the government to control the defense's case by requiring it to respond to the testimony in kind. And second, the ruling permitted the government to put on extensive evidence that the appellant was not truly mentally ill, but a malingerer. They assert, referring to the post-trial affidavit in support of the Petition for New Trial, that such testimony was not a true reflection of the appellant's mental state.

Citing Mil. R. Evid. 302(b)(2)[2] as authority they urge that introduction of expert testimony on mental responsibility by the defense is a condition precedent to the government's ability to put on expert testimony to the contrary. We agree that the defense's interpretation of this provision is reasonable, but hasten to suggest that it must

---

[2] Rule 302. Privilege Concerning Mental Examination of an Accused.

(b) Exceptions.

(2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused *if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence,* but such testimony may not extend to statements of the accused except as provided in (1) [Emphasis provided]

be read in conjunction with Mil. R. Evid. 611(a), which allows the trial judge to exercise reasonable control over the presentation of evidence in order to develop the facts without needless consumption of time. Clearly, a trial judge retains the traditional power to depart from the usual order of proof. *United States v. Terry,* 727 F.2d 1063 (6th Cir. 1984). While we think it the far better practice for the government to respond to a defense assertion that the accused lacks the requisite mental responsibility, we do not find, in the case before us, that the trial judge abused his discretion in allowing the government to proceed in its case in chief with testimony relating to appellant's mental state. It is readily apparent from the record that mental responsibility or lack thereof was the pivotal issue as to the damaging government property allegation; trial defense counsel made that clear during his *voir dire.* The evidence the government offered during its initial presentation was admissible in rebuttal. Malingering, as a symptom of the appellant's overall condition, was a medical diagnosis and was relevant testimony. The appellant was not surprised by the testimony nor was he prejudiced. *Accord United States v. Watson,* 12 M.J. 983 (A.F.C.M.R. 1983).

III

After Doctor Martin testified concerning the appellant's mental condition, the trial counsel asked the military judge to release the narrative portion of the Sanity Board's findings as an aid in cross-examination. He contended that Doctor Martin's testimony "opened the door" to examination of statements the appellant may have made during the sanity hearing. In the course of his argument urging the trial judge to release the material, the prosecutor disclosed that he had knowledge of these statements prior to trial.

The first statement concerned the financial problems the appellant was experiencing, which the prosecution maintained went toward establishing the motive for the thefts. The second related to a conversation Doctor Martin overheard in the hospital corridor between the appellant and Doctor Townsend-Parchman (a Sanity Board member) to the effect that he (appellant) was "going to beat this rap" and no one was "going to get [him] on this offense [referring to the larceny]." Doctor Martin was not a party to the conversation but overheard it as he was walking by.

Appellate defense counsel contend that the trial counsel's knowledge of these statements, which he admitted he knew were privileged, were in contravention of paragraph 121, M.C.M., 1969 (Rev.) which states in part:

> No individual, other than defense counsel, accused, or after referral of charges, the military judge, shall *disclose to the trial counsel any statement made by the accused to the* [Sanity Board] or any evidence derived from that statement. [Emphasis added]

Relying on this provision they urge that the trial judge erred in admitting the statements which were breaches of the privilege created in Mil. R. Evid. 302(a).

Appellate government counsel argue that the defense "opened the door" to a discussion of the appellant's financial problems by their examination of Doctor Martin about their client's background, and that conversation Martin overheard in the hallway was not part of the Sanity Board evaluation and thus was not privileged.

There is no question but that trial counsel had knowledge of at least one statement by the appellant that was directly connected to the Sanity Board. He admitted this to the trial judge and candidly acknowledged knowing it was restricted information.

The issue before us is one of first impression. Should a sanction be applied, e.g., disqualification of the trial counsel or referral to a different convening authority when the prosecution is privy to statements an accused has made during a sanity hearing? And whether a sanction is imposed or not, does such disclosure require a *per se* rule of general prejudice as is applied when a confession is improperly admitted, *United States v. Taylor,* 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1958), or may the disclosure be viewed as harmless error where the evidence of guilt is compelling? The Court of Military Appeals and the Courts of Military Review have upheld the harmless error doctrine in numerous decisions involving errors of less than Constitutional dimension. *United States v. Colcol,* 16 M.J. 479 (1983); *United States v. Allen,* 7 M.J. 345 (1979); *United States v. Thompson,* 14 M.J. 721 (A.F.C.M.R. 1982); *United States v Clark,* 12 M.J. 978 (A.F.C.M.R. 1982); *United States v. Olah,* 12 M.J. 773 (A.C.M.R. 1981); *United States v. Bell,* 3 M.J. 1010 (A.C.M.R. 1977); *United States v. Midkiff,* 15 M.J. 1043 (N.M.C.M.R. 1983). Since the error under review concerns a procedural rule, any misapplication would not attain Constitutional proportion. An error not of Constitutional proportion may be found harmless if it can be determined that the factfinder was not influenced by it or the error was *de minimus* on the resolution of the issue. *United States v. Mendoza,* 18 M.J. 576 (A.F.C.M.R. 1984). We are aware that some legal commentators equate Mil. R. Evid. 302 with the broad protections offered by Article 31(b) of the Code. See Saltzburg, Schinasi and Schueter, *Military Rules of Evidence Manual* 64 (1981). However, we think a better reasoned approach is to determine if the challenged information was harmless error in light of the other evidence.

The statement involving the appellant's financial problems impacts only the larceny allegation. The defense theory was two-fold: 1) a denial that the appellant stole the property; and 2) his degree of intoxication negated the specific intent required for a wrongful taking. To meet its burden the Government established that Airman First Class Aaron A. Emfield left the Non-Commissioned Officers Club with the appellant at 2000 hours, 14 July 1982. They walked to their barracks nearby. Emfield did not remember anything after "hitting the bed" because he was intoxicated and on medication. The next morning he discovered his Ricoh camera and accessories missing as well as his roommate's RCA color television. A security policeman on patrol and who was in the barracks saw the appellant enter Emfield's room with Emfield. Later that evening he saw the appellant leave the building carrying a "box-like object." That same evening the appellant admitted to a friend, while seeking to borrow his car, that he had taken a television and other items from Emfield's room and needed to get off base. He later borrowed a car from another airman and drove off base to the residence of Gerald E. Hernandez, a former Air Force member, who testified that the appellant brought him a television and Ricoh camera to sell. Law enforcement officers subsequently recovered the items which were identified by their owners.

Under these facts we discern no prejudice flowing to the appellant from the use of a "privileged" statement providing a possible motive for the larceny. The evidence of guilt is otherwise compelling. *United States v. Logan,* 18 M.J. 606 (A.F.C.M.R. 1984).

We turn now to the overheard conversation in the hospital hall between the appellant and Doctor Townsend-Parchman. The nature and location of the communication

does not support a realistic assertion that it was a part of the Sanity Board proceedings. It was made under such circumstances that a disclosure by someone overhearing it was not only possible but quite likely. *See generally United States v. Robbins,* 47 C.M.R. 917 (A.F.C.M.R. 1969). In our opinion this was not the communication situation that Mil. R. Evid. 302 was enacted to protect. Not being part of the Sanity Board's proceedings, no privilege attached to the overheard statement, which impacts only the larceny conviction.

As stated earlier in this opinion, the trial counsel recognized that the information he uncovered during his pre-trial investigation was ostensibly privileged. However, he did not disclose this fact until that point in the trial when he thought it was admissible in rebuttal. As a part of his disclosure he assured the Court that he had "not used this information in anyway." We accept his averment as being made in good faith, but we nevertheless *strongly* urge that where the prosecutor has directly or indirectly learned of an accused's statement which is apparently privileged under Mil. R. Evid. 302, he should immediately disclose this fact to defense counsel and the military judge. *See generally United States v. Littlehales,* ____ M.J. ____ (A.F.C.M.R. 1984).

IV

Appellate counsel urge that the evidence fails to establish beyond a reasonable doubt that the appellant had the capacity to form the requisite specific intent to willfully damage government property. At trial the appellant stipulated he damaged the rooms in the manner alleged. He maintained then as he does now that his mental capacity was so impaired that he was not criminally liable for his conduct. This issue was fully litigated at trial and sub-

mitted to the members under the proper instructions. We have examined the record and find no basis to disturb the Court's determination of mental competency implicit in its findings of guilty. Article 66(c), U.C.M.J.; *United States v. Ragan,* 10 C.M.R. 725 (A.F.B.R. 1953).

We find appropriate only so much of the sentence as provides for a bad conduct discharge, confinement at hard labor for 20 months, forfeiture of $397.00 per month for 20 months and reduction to airman basic. The findings of guilty and sentence, as modified, are

AFFIRMED.

FORAY, Senior Judge and MURDOCK, Judge, concur.

OFFICIAL

/s/ CHARLES L. WILLE
CHARLES L. WILLE
Captain, USAF
Chief Commissioner

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—196-769/62032